TOH THEAM HOCK

v.

KEMAJUAN PERWIRA MANAGEMENT CORP. SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 192 OF 1986]
27 APRIL 1987

LEGAL PROFESSION: *Stakeholder - Interest on money held by solicitors - Appellant an advocate and solicitor - Retained 5% deposit of purchase price on behalf of clients - Appellant - Whether stakeholder or solicitor acting for respondents when he received the deposit - Whether appellant can be held accountable to respondents in respect of interest on the deposit up to issue of Certificate of Fitness.*

This was an appeal by the appellant, an advocate and solicitor, on the question of earning interest while the retention sum of 5% of the purchase price is being held under a fixed deposit account pending the issuance of the certificate of fitness. The appellant was retained by the respondents, a housing developer on 10th April 1980. The trial Judge held that the appellant was an agent and therefore liable for the interest on the 5% of the purchase price. The question was whether the appellant was a stakeholder or whether he was a solicitor acting for the respondents when he received the 5% deposit of the purchase price.

Held:
The appellant cannot be held accountable to the respondents in respect of the interest on the deposit up to the issue of the certificate of fitness as it was a clear term of the contract that the respondents were not entitled to the deposit until the certificate of fitness was issued. Therefore the respondents as a party were not competent to unilaterally alter the terms of the contract.

[Appeal allowed with costs.]

Cases referred to:
Sorrell v. Finch [1977] AC 728
Maloney v. Hardy [1970] 216 EG 1582
Burt v. Claude Cousins & Co. Ltd. [1971] 2 QB 426
Potters v. Loppert [1973] 1 All ER 658

Legislation referred to:
Solicitors' Accounts Rules 1967, r. 2

For the appellant - Lim Kean Chye (M. Singaram with him); M/s. Khong & Son
For the respondents - Lal Harcharan Singh (Markiman Kobiran with him); M/s. Abraham & Partners

JUDGMENT

Hashim Yeop Sani SCJ:

The appellant is an advocate and solicitor and the respondents are a housing developer. The respondents retained the appellant as their solicitor on 10 April 1980. The respondents as plaintiffs in the Court below went before the learned Judge with an originating summons praying for an order that the appellant (defendant) deliver to the plaintiffs a list of all monies

which have accrued as interest on the 5% of the purchase price which had been retained by him in respect of the sale of certain houses.

Before the learned Judge it was common ground that-

(a) the defendant is an advocate and solicitor;

(b) the plaintiffs were the developers and vendors of houses built on land held under EMR Nos. 490, 355, 266, 492 and Grant No. 1481 for Lot Nos. 388, 371, 420, 353 and 419 respectively in the mukim of Kamunting in the district of Larut & Matang in the State of Perak;

(c) the defendant was appointed as solicitor acting for the plaintiff company.

It was not disputed that 5% of the purchase price was retained by the appellant to be paid to the respondents as soon as the certificate of fitness was issued and that at some stage the certificate of fitness was in fact issued and the total amount of the deposit paid to the respondents. It was also not disputed that after the appellant refused to comply with the request of the respondents on the interest the respondents discharged the appellant as their solicitor on 9 November 1983 and engaged in his place Messrs. Lee Beng Cheang & Co.

The learned Judge granted the application of the respondents and in his grounds of judgment he said:

> Having considered the affidavits of both the plaintiffs and the defendant I am of the view that at all material times the defendant was acting as a solicitor for the plaintiffs' company. He is an agent of the plaintiffs. It follows therefore that the money he received from the purchasers are held by him as an agent and not as a stakeholder.

In the earlier part of his judgment he said that as solicitor the defendant acted as an agent of the plaintiffs and the terms of the sale and purchase agreement did not change the fact that he was an agent. Therefore as agent he was liable to account for whatever money he received for the plaintiffs including interests.

The crux of the matter therefore is whether the appellant was a stakeholder or whether he was a solicitor acting for the plaintiffs at the time he received the 5% deposit of the purchase price.

A copy of the sale and purchase agreement between the respondents and the various purchasers of the houses is to be found at pp. 32-44 of vol. 2. clause 3 of the agreement subjected the payments under contract to such other methods of payment as may from time to time be allowed under the Housing Developers (Control and Licensing) Act 1966 and any rules and regulations made thereunder and para. (h)(ii) therein provided that a sum equivalent to 5% of the purchase price be paid "to the vendor's solicitors or some other person or company authorised by the controller as stakeholder" for payment to the vendor on production of the certificate of fitness for occupation if any to the said building. This clause is in fact a reproduction in substance of paragraph 1(h) of schedule C to the Housing Developers (Control and Licensing) Rules 1970 on payment of instalments. The whole of paragraph 1(h) of the schedule reads as follows:

> (h) On delivery to the purchaser of vacant possession of the housing accommodation and the land as provided in r. 12(1)(o) or on completion of the transfer of the property as provided in r. 12(1)(p) whichever shall first happen the balance of 10 per cent of the purchase price, 5 per cent of which shall forthwith be paid to the licensed housing developer and

> the remaining 5 per cent shall be paid to the licensed housing developer's solicitors or to such other person as may be approved by the Controller as stakeholders to be paid to the licensed housing developer only on production of the Certificate of Fitness for Occupation of the Appropriate Authority in respect of the housing accommodation.

In so far as concerned the respondents the appellant was in a dual capacity during the material time. But in what capacity did he receive the deposit? The sale and purchase agreement and the schedule to the 1970 Rules would seem to show that he received the deposit as stakeholder. This is clear from the language used in both documents - "shall be paid to the licensed housing developer's solicitors or to such other person as may be approved by the controller as stakeholders".

What is in essence stakeholding? The word "stake" is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies *in Sorrell v. Finch* [1977] AC 728 who repeated what was said in *Maloney v. Hardy* [1970] 216 EG 1582:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

In any particular case of sale and purchase whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned Judge concluded that in this case the appellant received the deposit as agent for the respondents in a fudiciary capacity and therefore on general principles he would be accountable.

In *Burt v. Claude Cousins & Co. Ltd.* [1971] 2 QB 426 Lord Denning MR in his dissenting judgement explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell v. Finch (supra).* He said:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder", he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of Property of Reed* ([1967] 2 All ER 1286 at 1289), per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v. Hoggart* ([1830] 1 B & Ad 577). If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v. Kingsman* ([1818] 1 B & Ad 683) and *Hampden v. Walsh* ([1876] 1 QBD 189). He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

Pennycuick V.C. in *Potters v. Loppert* [1973] 1 All ER 658 at p. 661 considered the law in relation to contract deposits. Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent

his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

In the present case no doubt the appellant was retained as solicitor by the respondents during the material period. In the absence of any agreement to the contrary it would be easy to conclude that the appellant would have received deposits on behalf of the respondents as their agent or trustee. But the respondents entered into a contract in the form of a sale and purchase agreement wherein the respondents agreed to abide by the term of the agreement with regard to the 5% of the purchase price to be paid to their solicitors as stakeholder which was to be paid **only** on the production of a certificate of fitness for occupation of the premises. This provision in the contract was also in compliance with the provision in the 1970 Rules. We do not think that the respondents should be allowed to resile from what they had contracted; and their instructions to the appellant to place the deposits into fixed deposit account should not under the circumstances be made binding on the appellant. It was a clear term of the contract that the respondents were not entitled to the deposit until the certificate of fitness was issued. The respondents as a party were not competent to unilaterally alter the terms of the contract.

The view that the appellant cannot be held accountable for the interest would also seem to be consistent with the notes on r. 2 of the Solicitors' Accounts Rules 1967 shown to us by Mr. Lim Kean Chye where the following appears:

> Stakeholders
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> Although r. 2 of the Solicitors' Accounts Rules, 1967, lays down that for the purpose of those Rules money held by a solicitor as stakeholder is "client's money" and must be paid into a client account, in the Council's opinion (which is supported by the advice of Leading Counsel) when a solicitor holds money as a stakeholder the stake money does not belong to any specific client until the happening of the deciding event, and the solicitor can keep any interest earned thereon. Neither s. 8 of the Solicitors Act, 1965, nor the Solicitors' Accounts (Deposit Interest) Rules, 1965, apply to it.

In our view the appellant cannot be held accountable to the respondents in respect of the interests on the deposits in each case up to the date of the issue of the certificate of fitness. The appeal is accordingly allowed with costs.

Deposit to be returned to appellant.

Also found at [1987] 2 CLJ 26